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## Restatement of the Law of Torts and the Missouri Annotations, The

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# THE RESTATEMENT OF THE LAW OF TORTS AND THE MISSOURI ANNOTATIONS

GLENN MCCLEARY\*

The work of the American Law Institute in restating the common law in various subjects of the law is familiar to lawyers everywhere. After eleven years of intensive work by these judges, lawyers, and teachers of law, the first two volumes of the Restatement of the Law of Torts have been published.<sup>1</sup> The first volume deals with intentional harms to persons, land and chattels and the various defenses thereto.<sup>2</sup> The second volume covers the tort of negligence. When completed, the Restatement of Torts will comprise four or five volumes. But Volumes I and II are complete in themselves and do not depend upon the unfinished portions.

The various phases of these torts have been covered with such detail that some have thought the Restatement will tend to limit the future growth

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1. Work was begun on the Restatement of Conflicts of Law, Contracts, and Torts in 1923. Since this date the American Law Institute has undertaken the Restatement of the Law of Agency, Business Associations, Property, Trusts, Restitution and Unjust Enrichment, Sales of Land, and Security. Professor Bohlen, the eminent authority on the subject of Torts, was appointed Reporter for the Restatement of Torts. Among the advisers selected by the Council of the Institute to assist Professor Bohlen were Rousseau A. Burch of the Supreme Court of Kansas, Herbert F. Goodrich, Dean of the University of Pennsylvania Law School, James P. Hall, the late Dean of the University of Chicago Law School, Emmett N. Parker of the Supreme Court of Washington, Owen J. Roberts, until his appointment to the Supreme Court of the United States in 1930, Warren A. Seavey and Edward S. Thurston of Harvard University, George W. Wheeler, the late Chief Justice of Connecticut, Charles M. Hepburn, the late Dean of the Law School of Indiana University, Manley O. Hudson, then at Harvard University, Young B. Smith of Columbia University, Oliver W. Branch of the Supreme Court of New Hampshire, Robert Dechert of Philadelphia, Lyman P. Wilson of Cornell University, Edmund M. Morgan and Sayre MacNeil of Harvard University, Laurence H. Eldredge of Philadelphia, T. Scott Offutt of the Supreme Court of Maryland, and Fowler V. Harper of Louisiana State University. Besides these authorities, Benjamin N. Cardozo, formerly Chief Justice of the Court of Appeals of New York, prior to his appointment in 1932 to the Supreme Court of the United States, attended many of the conferences.

2. Among the subjects included here are assault, battery, false imprisonment, consent, self defense and defense of third persons, defense of property, arrest, prevention of crime, trespass on land, privileged entries on land, trespass to chattels, conversion, and the various defenses to the intentional invasion to the possession of chattels.

of the law in this subject.<sup>3</sup> On the other hand, the exhaustive treatment of the subject should make it indispensable to the practitioner and the jurist, not because it constitutes a conclusive basis of decision, but because it represents the best thought of the times. The tort of negligence has developed very rapidly since the middle of the last century without much assistance or guidance from scientific treatises on the nature of the various interests which society was seeking to protect and the extent to which it was considered socially desirable to give protection. The present effort to put together this growth in scientific form is in itself of inestimable value to the profession.<sup>4</sup> Law develops from the activities of common men rather than from the mind of the jurist. Its rational aspect appears after a certain growth has taken place. It seems a most propitious time to organize these elements of growth in such a manner as will make them accessible and intelligible, at the same time making clear the notions of social fairness that are behind the process. In every system of law there comes a time when the mass of precedents must be summed up in comprehensive statements of

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3. Dean Green of Northwestern University thinks "the attempt to restate tort law in rigid black letter form was a serious mistake. . . . Tort law is too liquid, too much a matter of processes, too growing and luxuriant to submit to any such tight form of statement. . . ." *The Torts Restatement* (1935) 29 ILL. L. REV. 582. The retort to this from a well-known English scholar: "But do not Dean Green's eloquent metaphors furnish in themselves the best justification for the work of the Institute? A liquid, be it wine or milk, turns sour unless it is tightly bottled, a forest growth which is too luxuriant becomes impassable. It is because this *Restatement* attempts to hew a path of principle through the tangled trees of individual cases that it is of peculiar value. Undoubtedly the law of torts is a more recent and a less orderly growth than is that of the law of contract or of agency, and therefore the formulation of its principles is a more difficult task, but this does not mean that it is too immature or experimental to be dealt with in this way. When textbook writers fifty years ago first undertook to state the law of torts as a coherent system it was argued that they were attempting the impossible. Now we recognize that their work was of vital importance to the proper development of the law." Goodhart, *Restatement of the Law of Torts* (1935) 83 U. OF PA. L. REV. 411, 968. For another thought provoking criticism of the Restatement of Torts, see Stone, Book Review (1935) 2 U. OF CHI. L. REV. 662. For a comparison of the Restatements with codes, see Franklin, *The Historic Function of the American Law Institute; Restatement as Transitional to Codification* (1934) 47 HARV. L. REV. 1367.

4. The American Law Institute in restating the general common law of the United States has recognized that the rapid growth in new rules and precedents, the rapidly increasing volume of decisions of the courts, and the ever increasing complication of economic and social conditions of modern life will only increase "the law's uncertainty and lack of clarity; and that this will force the abandonment of our common-law system of expressing and developing law through judicial application of existing rules to new fact combinations and the adoption in its place of rigid legislative codes, unless a new factor promoting certainty and clarity could be found." Hence the object of the Institute in preparing the Restatement "is an attempt to supply this needed factor."

principle. Such an organization should not only make it easier to predict the future but, at the same time, should assist in the great process of making law.

The purpose of this paper is to acquaint the Missouri bar with the usefulness of the Restatement through the state annotations, and to point out in a general way some of the differences found between the Missouri decisions and the Restatement in the tort of negligence.<sup>5</sup>

#### STATE ANNOTATIONS

So that the bench and bar of Missouri may be apprised of any local variations, and also be able to have ready reference to the local decisions pertaining to the statements of law in the various Restatements, the Missouri Bar Association, for the past six years, has appropriated a sum of money to produce the annotations for Missouri. Similar efforts are being made in many other states. The annotations to the Restatement of Contracts and to the first two volumes of the Restatement of Torts are now available to the profession. The annotations show the position of local authority, whether established by decision or statute, upon the general rule as stated in the Restatement.<sup>6</sup> Thus the usefulness of the Restatements is greatly enhanced.

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5. Within the space of this paper it is impossible to do more than point out a few of the more important divergencies. For this reason it was thought more desirable to limit the differences which may be found between the Restatement and the Missouri decisions to one field, that of negligence, rather than to attempt to cover the whole of the Restatement. Each tort lends itself to a similar study.

6. These notes contain only the bare minimum information concerning the Missouri decisions. To comment at length would have added greatly to the expense of the printing; furthermore, it would defeat the purpose of the annotations if the annotator attempted to do more. Thus the members of the bar in using these annotations will make their own careful comparisons from the data given, something they would do anyway even if the annotator's opinions were set forth. To compare at length some of the sections with the Missouri decisions would require notes of considerable length. For example, see essays by the writer, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land* (1936) 1 Mo. L. Rev. 45; and *The Liability of an Employer for the Negligence of an Independent Contractor in Missouri* (1933) 18 St. Louis L. Rev. 289. In many instances it was thought to be more helpful to cite the collection of cases in the Missouri Digest rather than to attempt to cite the cases individually. There are more than seven thousand cases in the Missouri Reports in which some aspect of negligence is involved. In scores of decisions the court may have repeated certain elementary principles so familiar that citation to cases by any other method would be a waste of time. This has a double advantage in that it dovetails the Restatement and the Digest, and it also has the additional advantage of keeping the annotations abreast of the cases.

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The annotations to the Restatement of Torts are intended to cover three possibilities with regard to Missouri law and the general statements of principles and rules of law in the Restatement. The first situation is where the Restatement accords with the position of the Missouri courts. This, of course, is the usual and common situation. Most of our decisions are in agreement on most propositions. Since the Restatement is based upon the American decisions, one would expect this great similarity. But the use of terms in judicial decisions is not uniform. Different courts frequently express the same point in different ways; individual judges in the same court often vary in their ability to use clear and concise language. Hence, there will be many places in the Missouri decisions where the results may be entirely consistent with the Restatement but where the method of expression is so different that only on careful analysis will the consistency appear. Occasionally, reconcilable differences are due to more than the choice of words—the analysis and manner of stating the conclusion may differ—yet the legal result is the same. This situation has been constantly confronted in comparing the cases and the Restatement.

The second situation to be shown through the annotation is the absence of local authority upon the rules stated in the Restatement. It is surprising to find many such gaps even in a state with a long judicial history, but no court has as yet had to decide all questions. Dicta and analogies have been noted where available.

The third situation which the annotations show is the inconsistent position between the Restatement and the Missouri law. The instances are not numerous, yet in places where differences do appear the profession should give considerable thought to the social value of each rule.

TERMINOLOGY AND PHRASEOLOGY

In one's first attempt to use the Restatement of Torts, he will notice a difference between the terminology and phraseology of the Restatement and the local decisions. Up to the present the law of torts in general has been stated in terms of remedies rather than in terms of the invasion of legally protected interests.<sup>7</sup> The emphasis has shifted from procedural devices to a consideration of interests which, from social considerations, should be protected. The growth of tort law has resulted from a continuous tendency

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7. See Rosenberry, C. J., in *Osborne v. Montgomery*, 203 Wis. 223, 234 N. W. 372 (1931).

to give protection to interests which in the past had not been protected, and to extend further recognition to interests already protected to a certain extent. Thus the Restatement of Torts groups the various interests which the law protects in the tort actions and deals with the extent of the protection given to these various interests. The basic idea of liability for wrongful acts is that, upon a balancing of the social interests involved in each situation, the law determines that the actor should or should not be responsible.

One of the contributions of the Restatement is in putting into scientific form legal doctrines which have not been articulated by the courts except by the general use of words to describe the particular legal consequence. For example, the word "privilege" becomes very important to the legal vocabulary and "is used throughout the Restatement of this Subject to denote the fact that conduct which, under ordinary circumstances, would subject the actor to liability, under particular circumstances, does not subject him thereto."<sup>8</sup> This privilege may be based upon consent or it may be law given, as where "its exercise is necessary for the protection of some interest of the actor or of the public which is of such importance as to justify the harm caused or threatened by its exercise." The word "privilege" expresses a general principle of social policy in those situations where conflicting interests are of such a character that the larger social good requires a freedom on the part of the actor which goes beyond that usually allowed. Likewise, instead of looking at the defense of consent or of self-defense merely as a justification or an excuse, the emphasis is shifted to the social policy which lies behind the immunity in those situations in which the invasions of otherwise legally protected interests of others are prevented from being legal wrongs because, on the whole, it is felt that the invasions will do more good than harm under the circumstances.<sup>9</sup>

Among other terms used in the Restatement of Torts which differ from those employed in the Missouri decisions is that used in describing those who may be injured on the land in the possession of another. The Missouri decisions classify all such persons as trespassers, licensees, and invitees. Due to this limited classification and because it is considered socially desirable to hold the possessor responsible for activities highly dangerous to constant

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8. RESTATEMENT, TORTS (1934) § 10.

9. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality* (1926) 39 HARV. L. REV. 307; STUDIES IN THE LAW OF TORTS (1926) 614. For a good exposition of the term "privilege" in the law of torts, see HARPER, TORTS (1933) 21.

trespassers upon a limited area, as, for example, where large numbers of the public are to the knowledge of a railway company in the habit of crossing its line at a certain point, the Missouri courts have been forced to place them in the licensee category, there being no recognized protection to unknown trespassers.<sup>10</sup> The effect of this has been to limit responsibility to all who may be called licensees even though they come upon the land with a real consent given by the possessor, just because they are in the same category.<sup>11</sup> The Restatement has given this group a distinct classification by calling them constant trespassers upon a limited area to distinguish them from the casual, probable, or known trespasser.<sup>12</sup> The cloak of the fiction is withdrawn and the licensee category purged of a mongrel. While the same protection is given them as trespassers by the Restatement that the Missouri decisions give to them as bare licensees, the Restatement's licensee is quite properly limited to one on the premises with the consent of the possessor. The invitee or invited licensee in the Missouri decision is designated a business visitor in the Restatement.<sup>13</sup> The basis for this classification separating them from other gratuitous licensees is the financial benefit to the possessor. Thus the persons on the premises of another fall into very logical categories in the protection which the law requires from the possessor.<sup>14</sup>

In treating the problem of causal relation necessary to responsibility for negligence the Restatement has definitely contributed to a better terminology by substituting the expression "legal cause" for the customary words "proximate cause." The customary word "proximate" in its accurate meaning denotes the nearest or, at least, something quite near. The effect may have been to restrict unduly liability in many instances. But in legal

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10. See the leading case of *Annefeld v. Wabash R. R.*, 212 Mo. 280, 111 S. W. 95 (1908) (citing many Missouri decisions on this problem); and cases collected in Mo. DIG. (1930) tit. RAILROADS, § 356.

11. The leading Missouri decision is *Glaser v. Rothschild*, 221 Mo. 180, 120 S. W. 1 (1909). For an illustrative case, see *Wencker v. Missouri K. & T. Ry.*, 169 Mo. 592, 70 S. W. 145 (1902). Other cases are collected in Mo. DIG. (1930) tit. NEGLIGENCE, § 32; RAILROADS, § 358. The RESTATEMENT, § 342, subjects the possessor to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon where the possessor knows of the condition, realizes the risk and has reason to believe that they will not discover the condition or realize the risk, unless he uses reasonable care to warn them of the condition and the risk involved.

12. Sections 334 and 335.

13. Section 343.

14. See a more complete discussion by the writer of the Missouri decisions and the provisions of the Restatement applicable to the liability of a possessor for injuries received on the land, *loc. cit. supra* note 6.

usage it merely denotes that for one reason or another the sequence of events from the defendant's negligent act to the plaintiff's injury is such as to make it proper to hold defendant liable. If the sequence of events is such as to make it seem improper to hold the defendant, the court will call the result a "remote" and not the "proximate" consequence. The term "legal cause" is a much better description to denote the fact that the manner in which the actor's tortious conduct has resulted in an invasion of some legally protected interest of another is such that, from consideration of fairness and social policy, the law regards it just to hold the actor responsible for the harm.<sup>15</sup>

To simplify the process of instructing juries as to the matters which they are to take into consideration in determining whether the defendant's conduct is the legal cause of the injury, the older formulas of "natural and probable consequence" or "proximate result" as found in the Missouri decisions have been discarded for a neater term "substantial factor." Thus the actor's negligent conduct is a legal cause of harm to another if his conduct is a "substantial factor" in bringing about the harm.<sup>16</sup> "Proximate" or "natural and probable" have served the same purpose in submitting the question of legal causation to the jury, but their usefulness has always been questioned as so much "talk in the air."<sup>17</sup> The term "substantial," while not a term of

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15. Section 9. Proximate or legal cause is a delimitation of cause in fact. Before the question of legal cause can arise it must first appear that the defendant's act was the actual cause or cause in fact of the plaintiff's harm. To determine whether an act is the cause in fact of a particular result the "but for" or sine qua non rule is applied. By this test, consequences are caused in fact if they would not have happened but for the defendant's conduct. *Coble v. St. L. S. F. Ry.*, 38 S. W. (2d) 1031 (Mo. 1931). See Carpenter, *Workable Rules for Determining Proximate Cause* (1932) 20 CAL. L. REV. 396ff; Smith, *Legal Cause in Actions of Torts* (1911) 25 HARV. L. REV. 103, 108ff; GREEN, *RATIONALE OF PROXIMATE CAUSE* (1927).

16. Section 431.

17. For the traditional use of the term "proximate cause" in the Missouri decisions, see collection of cases, Mo. DIG. (1930) tit. NEGLIGENCE, §§ 56, 140. In certain cases it is said that a cause of an injury is "proximate" if it be the efficient cause setting in motion circumstances leading to injury, unbroken by an independent cause. *McCloskey v. Salveter & Stewart Inv. Co.*, 317 Mo. 1156, 298 S. W. 226 (1927); *Northern v. Chesapeake & Gulf Fisheries Co.*, 320 Mo. 1011, 8 S. W. (2d) 982 (1928). Illustrative of the manner in which an inquiry is transported from the realm of simple considerations of everyday life to be lost in a flood of words is seen in *Wongert v. Lyons*, 221 Mo. App. 362, 273 S. W. 143 (1925), in which the general rule is taken from Cyc: "... It is not necessary that the cause of the injury should be the immediate, the last, or the nearest cause in time or distance to the consummation of the injury. It is sufficient if it be the efficient cause which set in motion the chain of circumstances leading up to the injury, and which in natural, continuous sequence, unbroken by any new and independent cause, produced the injury. The



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precise definition any more than other formulas for this purpose, conveys to the jury an idea sufficiently meaningful to enable them to perform their function. It is sufficient to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense in which there is the idea of responsibility. A long step ahead has been taken in legal science by the recognition that little value is to be found in attempting to put specific meaning to these terms.

These examples are illustrative of the general overhauling given by the Restatement to the terminology of the subject.

SOME SIGNIFICANT DIFFERENCES BETWEEN THE PRINCIPLES FOUND IN THE  
RESTATEMENT AND THE MISSOURI LAW IN THE TORT OF NEGLIGENCE

As pointed out elsewhere, the principles formulated in the Restatement and those found in the Missouri decisions in most situations do not differ. As in any carefully prepared treatment of a body of law those preparing the Restatement have worked through the various factors which are presented in a given situation with a thoroughness and precision that cannot be found in the cases. In result the same legal consequences are reached in both sources in all but a few important instances. Without making any attempt to gather together all variations found between the Restatement and the Missouri decisions, it was thought desirable to point out some of the more significant differences in the field of negligence. It will be observed that, where there are variations, the Restatement has taken a more advanced position in protecting the interests involved. The most important exception to this observation is in Missouri's application of the humanitarian doctrine to situations not covered by last clear chance principles. It should be pointed out that the Institute has not attempted to make new law but only to express the result of a careful analysis of the subject and a thorough examination of pertinent cases from all jurisdictions.

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primary cause will be the proximate cause where it is so linked and bound to the succeeding events that all create or become a continuous whole, the one so operating on the others as to make the injury the result of the primary cause." In other cases an act is held not to be the proximate cause unless the injury was the natural and probable consequence. See cases in Mo. DIG. (1930) tit. NEGLIGENCE, § 58. But these terms are inadequate for the determination of negligence cases and yet probably serve as well as any other ritual.

## PHYSICAL INJURIES FROM EMOTIONAL DISTURBANCE

One noteworthy divergence between the Restatement and the Missouri decisions pertains to the liability for negligently induced emotional distress which results in physical injury. The Restatement has accepted the growing tendency in the cases to recognize liability where the actor unintentionally causes emotional distress to another which results in illness or bodily harm, if he should have realized that his conduct involved an unreasonable risk of causing the distress, and from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.<sup>18</sup> If the actor's conduct is negligent because he has breached the duty of care designed to protect another from such emotional disturbance where an unreasonable risk of injury could be foreseen, the fact that the harm results solely through the internal operation of the shock or emotional disturbance does not relieve the actor from liability.<sup>19</sup> But more than this, if the actor's conduct is negligent because it creates an unreasonable risk of causing bodily harm otherwise than by subjecting the other to shock or emotional disturbance, the fact that such harm results solely from the internal operation of the shock or other emotional disturbance does not relieve the actor from responsibility.<sup>20</sup> In the latter situation the person injured by good fortune escapes the threatened bodily harm but is so shocked as to miscarry or to suffer other forms of injury. However the emotional disturbance must be from the fear of the harm threatened from the negligent act and not from subsequent brooding over the matter. The case of *Purcell v. St. Paul City R. R.*,<sup>21</sup> illustrates this line of authority. The Missouri decisions have followed the other line of authority which requires some form of external physical injury, before physical injuries from the emotional disturbance may be

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18. Section 313. By Section 306 an act may be negligent if the actor realizes or should realize that his conduct invokes an unreasonable risk of subjecting the other to emotional disturbance of such character as to be likely to result in illness or other bodily harm.

19. Section 436.

20. Section 456.

21. 48 Minn. 134, 50 N. W. 1034 (1892). The cases are collected in (1921) 11 A. L. R. 1134; (1926) 40 A. L. R. 985; (1932) 76 A. L. R. 683; (1935) 98 A. L. R. 403. This question has been considered by Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact* (1902) 41 AM. L. REG. (n. s.) 141; STUDIES IN THE LAW OF TORTS (1926) 252; Goodrich, *Emotional Disturbance as Legal Damage* (1922) 20 MICH. L. REV. 497; Throckmorton, *Damages for Fright* (1921) 34 HARV. L. REV. 260.

included in the damages.<sup>22</sup> The underlying reason for this additional requirement is the danger of fabricated claims. Experience has shown that juries tend to believe the testimony of the plaintiff as against that of medical experts, something the courts cannot control. Therefore, the only way to control this situation is to deny a recovery as a matter of law unless there are additional elements present to give authenticity to the claim, such as external physical injury resulting from the same negligent act. On the other hand if the negligent conduct has brought about an injury so as to create an independent cause of action, the Missouri courts have never hesitated to permit pain and resulting mental suffering as additional elements of damage which may be recovered.<sup>23</sup> These cases show that the actual reason for denying a recovery where the physical injuries result solely from the internal operations of the shock is one of policy resulting from the difficulty in securing evidence which is likely to be trustworthy.

#### LIABILITY OF A MANUFACTURER TO THE CONSUMER

Among the significant contributions of the Restatement is the scientific treatment of the body of law pertaining to the liability of a supplier of a chattel. The law had developed around types of suppliers of chattels such as bailors, lessors, manufacturers, and other types without recognition of common principles pertaining to all. The decisions pertaining to the liability of a manufacturer had developed from one of two different approaches. The older one was that no duty was owed to others than the person immediately supplied by the manufacturer on the ground that there was no privity of contract.<sup>24</sup> To this certain exceptions have been engrafted so that the rule has almost been displaced.<sup>25</sup> One was where the act of negligence of the

22. *Porter v. St. Joseph Ry. Light, Heat & Power Co.*, 311 Mo. 66, 277 S. W. 913 (1925); *McCardle v. Peck Dry Goods Co.*, 271 Mo. 111, 195 S. W. 1034 (1917). For a critical study of the Missouri decisions in the various aspects of injuries from shock and emotional disturbance, see Comment (1937) 2 Mo. L. Rev. 67. For the decisions in other jurisdictions taking this position, see Notes (1921) 11 A. L. R. 1119; (1926) 40 A. L. R. 983; (1932) 76 A. L. R. 681; (1935) 98 A. L. R. 402.

23. See collection of cases, Mo. Dig. (1930) tit. DAMAGES, § § 48-52. In such actions it is not necessary to show resulting bodily harm from the emotional disturbance. *A fortiori*, if actual physical injury results from the emotional disturbance or shock such damage would be included. *Dreyfus v. St. L. & S. Ry.*, 124 Mo. App. 585, 102 S. W. 53 (1907).

24. *Winterbottom v. Wright*, 10 M. & W. 109 (1842).

25. Sanborn, J., in *Huset v. J. I. Case Thresh. Mach. Co.*, 120 Fed. 865 (C. C. A. 8th, 1903) (citing many decisions illustrating each exception). This phase of liability has been developed by Bohlen, *Liability of Manufacturers to Persons other than their Immediate Vendees* (1928) 45 L. Q. Rev. 343; *The Basis of Affirmative Obligations in the Law of Torts* (1905) 53 Am. L. Reg. 337; *STUDIES IN THE LAW OF TORTS* (1926) 33, at 109.

manufacturer was highly dangerous to the life and health of mankind and was committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, such as foods and drugs. The other was where one makes an article which he knows to be imminently dangerous to life or limb to another who has no notice of its qualities, the one being liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not. These arbitrary exceptions to the limitation upon the manufacturer's liability have by one means or another been so extended that in fact liability is almost as broad as if it were stated in straight negligence principles. Thus the categories of articles intended to preserve, destroy or affect human life have been extended to included articles which clearly have no tendency to do so directly, such as oils and other explosive substances, weapons, automobiles, bottles in which effervescent drinks are put up, and other articles.<sup>26</sup> Another method has been used to extend the manufacturer's liability within the exception which allows recovery where the manufacturer knows of the dangerous defect to life and limb, by holding that since he is the manufacturer he is held to know of those defects which he could have discovered by the exercise of reasonable care.<sup>27</sup> This has been the approach of the Missouri cases.<sup>28</sup> The Restatement, in looking at the

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26. See collection of cases in Notes (1922) 17 A. L. R. 672; (1925) 39 A. L. R. 992; (1929) 63 A. L. R. 340; (1934) 88 A. L. R. 527.

27. *Olds Motor Works vs. Shaffer*, 145 Ky. 616, 140 S. W. 1047 (1911); *Berg v. Otis Elevator Co.*, 64 Utah 518, 231 Pac. 832 (1925); *Sutton v. Otis Elevator Co.*, 68 Utah 85, 249 Pac. 437 (1926).

28. The early cases clearly limited the liability of a manufacturer on principles of negligence to the immediate parties to the contract, except where the articles sold were necessarily and inherently dangerous to human life, or where the manufacturer knew of the dangerous condition. *Heizer v. Kingsland & Douglas Mfg. Co.*, 110 Mo. 605, 19 S. W. 630 (1892). In that case an employee of the vendee was denied recovery for injuries received from an explosion of a cylinder of a steam threshing machine manufactured and sold by the defendants. The court stated that the evidence showed negligence in the construction and testing of the machine, but the defendant did not know of the dangerous condition and since machinery was not necessarily dangerous the action based on negligence must be confined to the immediate parties to the contract. This case was approved but distinguished in *Tipton v. Barnard & Leas Mfg. Co.*, 302 Mo. 162, 257 S. W. 791 (1924). Here the plaintiff relied on *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916), the doctrine of which is adopted by the Restatement. See discussion in the text, *infra*. The court in the Tipton case stated that the MacPherson case "Would seem to be in conflict with the Heizer case", but held the MacPherson case not to be in point on the facts. The next case, *Stolle v. Anheuser-Busch, Inc.*, 307 Mo. 520, 271 S. W. 497 (1925), seemingly gave no attention to the two possible approaches in deciding cases involving the liability of a manufacturer.

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general principles applicable to all suppliers of chattels has adopted Cardozo's view in the case of *MacPherson v. Buick Motor Co.*,<sup>29</sup> in which he put the source of a manufacturer's obligation on the law of negligence. The basic idea behind the duty of care has never been consensual but rather arises from a relation of the parties to which the law has attached certain obligations. Thus a manufacturer is liable who fails to use reasonable care in the manufacture of a chattel which, unless carefully made, involves an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is made and to those whom the supplier should expect to be in the vicinity of its probable use.<sup>30</sup> As pointed out, the results of the two approaches do not differ greatly yet the legal reasoning is entirely dissimilar. The science of law achieves greater dignity from a more rational technique than that employed in the past decisions.

## INFANT TRESPASSERS

In the protection which is given infant trespassers who may be injured while trespassing upon the premises of another, the Restatement goes far

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There, the defendant manufacturer sold to a merchant a bottle of "Budweiser" which was bought by a customer and brought to plaintiff's butcher shop, where it exploded, the pieces of flying glass striking and injuring the hand of the plaintiff's wife. The more recent decision of *McLeod v. Linde Air Products Co.*, 318 Mo. 397, 1 S. W. (2d) 122 (1927), approves the general principle of non-liability with its exceptions as stated in the *Heizer* and *Tipton* cases, but at the same time the court seemed to approve the *MacPherson* case. In the *McLeod* case, the defendant manufactured oxygen and sold it to the plaintiff's father for use in welding. It was delivered in steel tanks in which there was a pressure of 1800 pounds. Due to a defective valve, the tank exploded driving a piece of brass into the skull of the plaintiff. In affirming judgment for the plaintiff, the court said: "The early cases limited exception one to things in their nature destructive, such as poisons, explosives, and deadly weapons. We think the exception should be extended to include 'a thing which when applied to its intended use becomes dangerous', although not inherently so." While the court greatly extended the scope of the earlier exception to the general principle of non-liability of manufacturers as pronounced in the *Heizer* and *Tipton* cases, the court seems to follow both the result and the reasoning of the earlier Missouri decisions rather than the general principle adopted by the Restatement. The recent case of *Jacobs v. Frank Adams Electric Co.*, 97 S. W. (2d) 849 (Mo. App. 1936), has interpreted the *McLeod* case as doing away with the older approach through the exceptions and as applying straight negligence principles applicable to any supplier of a chattel. The *Jacobs* case employs this solution. While the *Jacobs* case is to be approved, the interpretation by the court of the *McLeod* case seems doubtful. See also, *Darks v. Scudder-Gale Grocer Co.*, 146 Mo. App. 246, 130 S. W. 430 (1910); *Harmon v. Plapao Laboratories*, 218 S. W. 701 (Mo. App. 1920). For a discussion of the liability of a manufacturer of foods, see Comment (1937) 2 Mo. L. Rev. 73.

29. 217 N. Y. 382, 111 N. E. 1050 (1916).

30. RESTATEMENT, TORTS (1934) §395.

beyond the protection permitted under the Missouri decisions. The so-called "attractive nuisance doctrine" as applied in Missouri seems to be restricted, especially in the later decisions, to the turntable cases.<sup>31</sup> At least, the tendency of the decisions is to restrict rather than extend the doctrine.<sup>32</sup> Under the principles of the Restatement, a possessor of land is liable for harm to young children trespassing thereon caused by an artificial condition which he maintains on the land if, (1) he knows or should know that children are likely to trespass at that place, (2) the condition is one which should be foreseen as involving an unreasonable risk of serious bodily harm to children, (3) the child is too young to discover the danger or realize the risk, (4) and the utility to the possessor of maintaining the condition is slight compared to the danger threatened.<sup>33</sup> The basis for the slight protection given in the Missouri decisions is that the attraction operates as an implied invitation to the child, thus putting it in the class of an invitee upon the land toward whom the possessor owes a duty of ordinary care. This, of course, is purely fictitious. The real basis for imposing liability at all is that it is good policy to impose the duty. All other reasoning seems open to objection. Despite all precautions of parents, the state, and the landowner himself, a child will trespass upon private property and will often be injured. So, it may be reasonable to require an owner to take certain precautions although the children are, in a strict sense, trespassers. Since each maimed and crippled child is a liability to society as well as a suffering, handicapped human being, and since, ordinarily, the dangerous condition can be guarded, it is not too great a burden to require the owner to provide a reasonable safeguard, or give effective warnings.<sup>34</sup> This the Restatement recognizes and, therefore, no fiction is needed to raise the child out of the trespasser class. Protection is recognized as socially desirable even though the child is a real trespasser.

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31. For recent cases refusing to extend the doctrine, see *Howard v. St. Joseph Transmission Co.*, 316 Mo. 317, 289 S. W. 597 (1926); *State ex rel. Kansas City Light & Power Co. v. Trimble*, 315 Mo. 32, 285 S. W. 455 (1926); *Shannon v. Kansas City Light & Power Co.*, 315 Mo. 1136, 287 S. W. 1031 (1926); but see *Blavatt v. Union Elec. Light & Power Co.*, 355 Mo. 151, 71 S. W. (2d) 736 (1934), noted in (1936) 1 Mo. L. REV. 366.

32. See the Missouri decisions collected in Mo. DIG. (1930) tit. NEGLIGENCE, §§ 23 and 39. The Missouri decisions are noted in (1923) 26 U. OF MO. BULL. L. SER. 32. For a general collection of cases see Notes (1925) 36 A. L. R. 34; (1926) 45 A. L. R. 982; (1928) 53 A. L. R. 1344; (1929) 60 A. L. R. 1444.

33. Section 339.

34. See (1923) 26 U. OF MO. BULL. L. SER. 32.

## GRATUITIOUS LICENSEES

The Restatement has adopted what has long been considered the better rule as to the protection which a possessor of land owes to gratuitous licensees while on the premises as to dangers arising from the condition of the premises. The possessor under this view is held liable for bodily harm caused to such persons by a natural or artificial condition if he knows of the condition and realizes that it involves an unreasonable risk, and he has reason to believe that they will not discover the danger or realize the risk if he does not exercise reasonable care either to make the condition reasonably safe or warn them of the danger and risk.<sup>35</sup> This is not too great a limitation on the use which the possessor should be free to make of his land, because a gratuitous licensee is one who is privileged to enter or remain upon the land by virtue of the possessor's consent although the possessor has no interest in his visit. The consent could have been withheld and, if it is given, it is not unreasonable to require that the possessor at least give warning of the dangers which an alert licensee will not likely discover for himself or of the risks which the possessor has reason to believe the licensee will not realize. Of course the recipient of the gratuitous license is not entitled to expect that special preparations will be made for his safety or that a warning will be given him of conditions which are perceptible or are within the licensee's own knowledge, but it does seem that he should be entitled to expect that the possessor will at least make a disclosure of the conditions he will encounter in exercising the privilege of which the possessor has knowledge.<sup>36</sup> The Missouri decisions, however, have held that no duty is owed by the possessor to give

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35. Section 342.

36. See the analysis of this problem by Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right* (1921) 69 U. OF PA. L. REV. 142, 237, 340; STUDIES IN THE LAW OF TORTS (1926) 156.

37. The decisions are collected in MO. DIG. (1930) tit. NEGLIGENCE, § 32; RAILROADS, § 358. For an illustrative decision, see *Wencker v. Missouri, K. & T. Ry.*, 169 Mo. 592, 70 S. W. 145 (1902). The leading case is *Glaser v. Rothschild*, 221 Mo. 180, 120 S. W. 1 (1909). In *Smith v. Southwest R.R.*, 333 Mo. 314, 62 S. W. (2d) 761 (1933), the court quotes with approval this section of the Restatement. But in the holding it seems that the court considered the plaintiff to be more than a gratuitous licensee. Without the recognition, at least, of the long list of Missouri decisions which preceded this case, it cannot be considered to have changed a well settled doctrine. But if there is a change in the condition of the premises which makes them less safe than at the time of granting the permission and which the licensee will not likely discover, a duty is owed to warn. *Wheeler v. St. J. S. Y. & T. Co.*, 66 Mo. App. 260 (1896); and see cases annotated in (1922) 20 A. L. R. 202.

warning in these circumstances.<sup>37</sup> A licensee takes the premises as he finds them and assumes the risk of perils from dangers on the premises.<sup>38</sup>

#### LESSOR'S DUTY TO REPAIR

As to injuries received on rented premises by the tenant or those on the premises in the right of the tenant, where the lessor has covenanted to repair, there have been two lines of authority.<sup>39</sup> The larger number of courts has held that the sole relation between the parties is based upon contract, so that breach of it created no liability for negligence, and that the mere violation of a contract, where there is no general duty, is not the subject of an action in tort. This has been the position of the Missouri decisions.<sup>40</sup> The other view is that the lessor of land is liable in negligence for bodily harm caused to the lessee and others upon the land with the consent of the lessee by a condition of disrepair if the lessor has contracted to keep the premises in repair. This requires that the disrepair create a risk of injury to persons upon the land which the performance of the contract would have prevented. Here the lessor's duty to repair is not considered contractual only but is a tort duty, because the contract gives the lessor ability to make the repairs and control over the premises for that purpose. His right to enter and have possession for that purpose is necessarily implied, and his duties and liabilities are in some respects similar to those of an owner and occupant. The contract is a mere matter of inducement to the relationship from which arises his affirmative duty. The obligation is not to make the premises absolutely safe but only to use reasonable care to make the premises safe. Unless the contract specifies that the lessor shall inspect the premises for the purpose of ascertaining the need for repairs, a duty does not arise to subject him to liability until after the lessee has given him

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38. *Glaser v. Rothschild*, 221 Mo. 180, 120 S. W. 1 (1909). See further discussion of this phase of Missouri law by the writer, *loc. cit. supra* note 6.

39. See the collection of cases in Notes (1920) 8 A. L. R. 765; (1930) 68 A. L. R. 1194. As to the liability for injuries received by persons outside the land caused by a condition of disrepair which the lessor's performance of his contract would have made reasonably safe, see Note (1934) 89 A. L. R. 480. As to the various persons who may be on the premises in the right of the lessee, see Notes (1923) 25 A. L. R. 1286; (1929) 58 A. L. R. 1415; (1931) 75 A. L. R. 160; (1935) 97 A. L. R. 224.

40. The leading decision is *Kohnle v. Paxton*, 268 Mo. 463, 188 S. W. 155 (1916) (disapproving *Graff & Lemp Brewing Co.*, 130 Mo. App. 618, 109 S. W. 1044 (1908), 145 Mo. App. 364, 129 S. W. 1005 (1910), and citing other Missouri decisions). Other cases are collected in Mo. Dig. (1930) tit. LANDLORD & TENANT, § 164 (2).



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notice of the need for repairs. This is the position taken by the Restatement.<sup>41</sup> This seems to be the tendency in the modern decisions. Apartment living makes it almost essential that the lessor make the repairs. Moreover, the custom is becoming quite prevalent for the landlord to do so.<sup>42</sup>

## RESCUE OF PROPERTY

The Restatement goes beyond the Missouri decisions in imposing liability in those cases where the plaintiff is injured in making normal efforts to avert threatened harm, caused by the defendant's negligent conduct, to property. The voluntary effort of the plaintiff to avert the threatened harm is not a superseding cause of injury from such efforts,<sup>43</sup> nor is it contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save the property from harm.<sup>44</sup> This is true not only where the harm is sustained by the one whose property is put in peril by the defendant's negligence, but also where a third person sustains injury in attempting to protect the property of another from the threatened harm. The minority position, which has been adopted by the Missouri court, refuses to recognize an exception to the doctrine of contributory negligence in such situation.<sup>45</sup>

## SUBSEQUENT INJURIES

An interesting extension of liability is found in the Restatement where a negligent actor, who is liable for an injury which impairs the physical condition of another, is also held for harm sustained in subsequent accidents which would not have occurred had the other's bodily efficiency not been impaired.<sup>46</sup> Where the second accident increases the injury of the member

41. Section 357 deals with injuries received on the land under these circumstances, and Section 378 deals with injuries received outside the land.

42. See analysis of the problem by Bohlen, *Landlord and Tenant* (1922) 35 HARV. L. REV. 633; STUDIES IN THE LAW OF TORTS, 202.

43. Section 445. Where the injury is sustained by a third person who incurs great danger in attempting to save the life of another threatened by the defendant's conduct, the Missouri decisions are in accord with the principles stated in this section. *Donahoe v. Wabash, St. L. & P. Ry.*, 83 Mo. 560 (1884); *Sherman v. United Rys. of St. Louis*, 202 Mo. App. 39, 214 S. W. 223 (1919); *Williams v. U. S. Incandescent Lamp Co.*, 173 Mo. App. 87, 157 S. W. 130 (1913); and see dictum in *Eversole v. Wabash R. R.*, 249 Mo. 523, 155 S. W. 419 (1913).

44. Section 472.

45. *Eversole v. Wabash R.R.*, 249 Mo. 523, 155 S. W. 419 (1913); and see *Brown v. Southwestern Bell Tel. Co.*, 274 S. W. 876 (Mo. App. 1925); *McManamee v. Missouri Pac. Ry.*, 135 Mo. 440, 37 S. W. 119 (1896). The Missouri decisions are discussed in (1920) 18 U. OF MO. BULL. L. SER. 33.

46. Sections 459 and 460. On the general problem, see Notes (1920) 9 A. L. R. 255; (1922) 20 A. L. R. 524.

originally injured, the Missouri decisions are in accord.<sup>47</sup> But where the second accident causes an injury to some other part of the body, which would not have been sustained had the other's bodily efficiency not been impaired by the initial injury, our decisions have not imposed liability.<sup>48</sup> Of course, the principle stated by the Restatement is applicable only to additional harm caused by the accident, for which neither the injured person nor a third person is legally responsible. The Institute has expressed no opinion as to whether the actor who is responsible for the weakened physical condition is or is not liable for later harm resulting from the subsequent negligence of a third person and not from a later accident.

### HUMANITARIAN DOCTRINE

As has been pointed out above, in all of these situations the Restatement has taken the more liberal position in protecting persons from bodily harm. The important exception to this observation is in the application by the courts of Missouri of the humanitarian doctrine to that situation to which last clear chance principles would not apply. Except under the humanitarian doctrine, a plaintiff cannot recover if his inability to avoid the accident is due to his own inattention similar to that of the defendant. The Restatement approves of this principle and denies liability.<sup>49</sup> Under the humanitarian doctrine the plaintiff is permitted to recover even though the accident is due to the equal inattention on the part of both himself and the defendant.<sup>50</sup> Thus, if the defendant does not see the plaintiff, but by using care, assuming a duty owed, he could have discovered plaintiff's position of danger in time to have avoided the injury, liability is established. In such a situation neither had the last clear chance, both were mentally absent, and each had the same opportunity to prevent the injury.

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47. *Conner v. City of Nevada*, 188 Mo. 148, 86 S. W. 256 (1905); see also, *Papic v. Freund*, 181 S. W. 1161 (Mo. App. 1916); and *Croak v. Croak*, 33 S. W. (2d) 998 (Mo. App. 1931), to the effect that the defendant is answerable only for injuries sustained while the injured member is in the process of healing but not for those sustained after the member has healed, although it is left in a permanently weakened condition.

48. *Croak v. Croak*, 33 S. W. (2d) 998 (Mo. App. 1931); *Powers v. Kansas City*, 224 Mo. App. 70, 18 S. W. (2d) 545 (1929).

49. Section 480.

50. The cases are collected in MO. DIG. (1930) tit. NEGLIGENCE, § 83; RAILROADS, § 390; AUTOMOBILES, § 227. These cases must be sorted into those involving physical helplessness produced by plaintiff's own negligence and those involving mental obliviousness. It is only in the latter that the humanitarian doctrine carries liability beyond that recognized by the Restatement.

### CONCLUSIONS

The profession is indebted to the Institute for entering upon an enterprise unprecedented in modern times. This most exhaustive analysis of the various problems which arise out of certain relationships provides invaluable material to lawyers and judges who may have to deal with those and closely related problems, and no serious student of the law of torts will be able to ignore it. Nowhere is there to be found such a systematic analysis of such problems as the liability of a possessor of land for injuries received on or off the land due to dangerous conditions or activities conducted on the land; the liability of a supplier of chattels; the factors important in the determination of the standard of reasonable conduct; the problem of causation; and a host of other problems too numerous to mention specifically. The Restatement has articulated much that courts have instinctively felt but have not attempted to set forth in the opinions. Above all, it represents the best legal opinion of the time. It is not intended to be a code, a textbook, a statement of law actually prevailing in any one state, or a statement of an ideal body of law; it does express the result of a careful analysis of the subject and a thorough examination of pertinent materials.<sup>51</sup>

If the Restatement of Torts receives the approbation of the courts that other Restatements have received many jurisdictions, we may expect to find its influence in the judicial language used, even though the law of the state is in accord with the principles stated in the Restatement; in the decisions on points which, up to the present, have not been decided by our courts; and even in the adjudication of problems on which the courts may have taken a position in the past not in agreement with the Restatement. Courts cannot ignore the Restatement as a very persuasive source of law.<sup>52</sup>

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51. Stallybrass, Book Review (1935) 48 HARV. L. REV. 1444.

52. For example, see *Baker v. Sears Roebuck & Co.*, 16 F. Supp. 925 (S. D. Cal. 1936), where the Restatement of Torts was quoted as the sole source of authority, without examination of previous precedents.